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Supreme Court of the United States

October Term, 1957.

No. 865.

SOCIALIST PARTY, USA, a political party, and WILLIAM BRIGGS, individually and as California State Chairman of the SOCIALIST PARTY, USA, on behalf of themselves and other members of the SOCIALIST PARTY, USA,

Petitioners,

vs.

FRANK M. JORDAN, as Secretary of State of the State of California.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

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IN THE

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Brief Amicus Curiae of the American Civil Liberties Union of Southern California.

Pursuant to Rule 42(1) of this Court, this Brief is being filed with the consent of the parties. Said consent is being forwarded concurrently herewith.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California (here designated ACLU) does not have or express any interest in the Socialist Party USA, nor is it the purpose of the ACLU to further any policy, plank, or aim of

the Socialist Party.[1] The ACLU is interested in the civil liberties questions which are involved in the present proceeding. As has been demonstrated to be true in many other cases, the ACLU is interested in expanding civil liberties to the farthest extent compatible with a reasonable conception of order.

In no area of political life is our concept of democracy more acutely tested than in the area of minority political parties. The deviation from common acceptance which is implied in the fact that the party is a minority party, is a peculiarly critical test of the reality of the civil liberties accorded by the State to its citizenry.

The right of suffrage may be regarded in the last analysis as the right by which most other civil liberties exist. The magnificent safeguards accorded by our State and Federal Constitutions to press and speech go for naught unless the product of free expression may be made manifest at the polls.

Accordingly the ACLU, as *amicus curiae*, presents this memorandum in behalf of the petitioners and respectfully requests the Court to give consideration to the fundamental constitutional questions involved.

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[1]In the court below the attorneys for the ACLU filed a brief *amicus* in the Christian Nationalist Party case (Appx. A, attached to Petition for Writ of Certiorari herein). *Amicus* understands that that Party is not petitioning in this Court.

ARGUMENT.

I.

Function of the Minority Party.

The minority party is indispensable in developing concepts of government and new institutions to meet changing conditions. The minority party is the pilot plant, or to use another simile, the nursery, for new ideas. Neither the Democratic nor the Republican Party may be willing to assume the risk of advocating a new concept in government, no matter how excellent it may appear. In one sense, the major parties cannot afford to take that risk by reason of the great stakes those parties have in incumbencies. History has shown that the major parties do not lead the electorate; they seek merely to express what the party thinks are the people's wishes. Until an idea, be it the most valuable yet conceived, has won acceptance by great masses of the people, it cannot find its way into the platform of either of the major parties.[2]

The result would be stagnation in political thought or violent eruption unless there were some machinery for housing, cultivating, and popularizing new notions to the point of winning a place with the major parties. One of the most important devices to those ends is the minority party. The major parties elect candidates; the minority parties often do the political thinking of the country.

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[2]Witness the Prohibition Party, with no success at electing candidates, but whose ideas and arguments resulted in the Eighteenth Amendment to the Constitution.

Many policies now well established and non-controversial found their way into American life by means of the minority party.[3] Social and political reform of all kinds is implicit in the condemnation of the *status quo* and carries a threat to the parties in power; such reforms only come to life outside the major party. When the short-lived hates and enthusiams of the week have faded, when the testing period is over, there sometimes remains some enduring principle which the major parties cannot afford to reject.

Numerous examples come to mind. It is peculiarly appropriate in the present case to recall that in the past half century many ideas, formerly condemned as socialistic and populistic, have now become the law of the land, and indeed the rallying point for patriotism.

For these reasons minority political parties must be protected by the State. The right of the minority to become a majority has been said to be one of the tests of a true democracy. The State must permit the growth of minorities to proceed unlimited except by the extrinsic quality of ideas and policies advocated by the party.

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[3] *Cf.* opinion of the Chief Justice in *Sweezy v. New Hampshire*, 354 U. S. 234, 251:

> "All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted."

II.

A Place on the Ballot.

The right to a place on the ballot is not merely the right of the Socialist Party or of socialism; the right is that of the entire electorate. This can be made clear by a consideration of some of the consequences of an election.

The most conspicuous consequence of an election is that someone is elected or that a measure is carried or defeated. But an election means much more than that. An election, particularly a national election, is in some degree an official measure of political attitudes at a given moment. The vote which does not carry, as for example, Republican presidential candidates between 1932 and 1952, is not a nullity by any means. That vote speaks to the administration with the voice of millions of citizens, and it speaks to the whole world with voices of Americans just as cogently, for every purpose short of election, as does the vote in favor of the winner.

Specifically with regard to minority parties the vote may measure the growing acceptance or rejection of new ideas. It is one of the most important tests by which the major parties will admit to or reject from their platforms the policies advocated by minority parties. In this way the place on the ballot for minority parties serves the interest, not only of the minority party and its followers, but also the interests of the majority parties, and, of course, the interests of citizens generally.[4]

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[4]In the long run, there is probably "no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage." (*Yick Wo v. Hopkins*, 118 U. S. 356, 370.)

III.

The Qualifying Tests for Appearance on the Ballot.

Since the right to be elected is the correlative of the right to elect, and since both rights derive from our fundamental conceptions of government, the presumption must be that any political party is entitled to a place on the ballot, and that the burden is on the agency or official who, or the statute which, seeks to deny that right. This distinction is important. To appear on the ballot is not a privilege requiring justification by the party which seeks it; it is a right derived from the Federal and State Constitutions and from the fundamental policies of American life. Note that the origin of all political power and action lies in the people (IX and X Amendments, Federal Constitution).

In the field of the First Amendment, this Court has looked with a cold eye on the grounds advanced by municipalities for interfering with or curtailing freedom of speech or assembly. Various grounds, sufficient in themselves to sustain the exercise of police power by the State or its agencies, have been examined and found insufficient to justify an abridgment of speech, press, or assembly. It is not enough that an exercise of such police power by the State might, in other circumstances, be sustained; the purposes to be furthered by the exercise of that police power must be so overwhelming as to justify denial of these most important constitutional rights if the ordinance or statute is to be permitted to stand.

Schneider v. Irvington, 308 U. S. 147, 161;

Thornhill v. Alabama, 310 U. S. 88, 95;

Herndon v. Lowry, 301 U. S. 242, 258;

Thomas v. Collins, 323 U. S. 516, 529;

Carlson v. California, 310 U. S. 106, 113;

Staub v. City of Baxley, 355 U. S. ....., 2 L. Ed. 2d 302;

Cf. United States v. Carolene Products Company, 304 U. S. 144, 152.

This reasoning applies *a fortiori* to a statute which would deny a party a place on the ballot.

The reason is that the action of the citizen at the polls is the culminating product of free speech, free press, and assembly. The opportunities for speaking, hearing, reading, meeting, debate, and discussion serve many great purposes but none more salutary or essential for the life of the State than the act which brings to bear, at the moment of voting, of all of the results and values of speech and assembly. What safeguards the Constitution extends to those rights must be extended to the right to a place on the ballot, lest the former rights expire in frustrated inaction. The tests in the California Elections Code do not commend themselves for immediate acceptance. The vote cast in a former election—is scarcely a sound test for denying a present right. The measure of qualification by the last vote ought not to be tested by the likelihood of success at the election, because if this were the test both the Republican and Democratic Parties would have to struggle for a place on the ballot in various parts of the country. The cost of qualifying a party by petition appears prohibitive, and the number of signatures required bears no palpable relationship to the purposes of the ballot. It is doubtful whether a numerical qualification stated in a percentage of the qualified voters bears any reasonable relationship to the purposes of the ballot but appears to be related to the likelihood of winning at the election.

The trifling cost involved in allowing petitioner to be on the ballot invites examination by this Court of California Elections Code, Section 2540, in the light of the fundamental purposes to be served and the constitutional rights involved.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

MORRIS E. COHN,

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